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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ELENA ZAGALA POUND, Defendant and Appellant.	B173188 (Los Angeles County Super. Ct. No. LA040671)

APPEAL from a judgment of the Superior Court of Los Angeles County, Darlene Schempp, Judge. Affirmed in part and reversed in part with directions.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, Lawrence M. Daniels and Alan D. Tate, Deputy Attorneys General, for Plaintiff and Respondent.

Elena Pound appeals from the judgment entered following a jury trial in which she was convicted of two counts of grand theft by embezzlement. She contends that she was subject to conviction of only one count and that she was improperly sentenced. (Defendant also raised a statute of limitations argument but abandoned it in her reply brief.) We reverse the judgment as to one of the counts with instructions to dismiss it, and we otherwise affirm.

BACKGROUND

Defendant was charged with and convicted in count 2 of grand theft by embezzlement between January 1, 1999, and December 31, 1999, and was charged with and convicted in count 3 of grand theft by embezzlement between January 1, 2000, and January 31, 2000. (Count 1, which alleged grand theft by embezzlement in 1998, was dismissed during trial.)

The prosecution evidence established that in April 1998, Sandra Reid hired defendant as bookkeeper and financial manager of Reid's dressmaking business. In February 2000, Reid discovered that in a continuing series of transactions defendant had improperly removed approximately $30,000 from the business's accounts. In defense, defendant claimed that all of the transactions had been authorized by Reid.

The probation officer's report recounted that defendant had been convicted of seven counts of theft in Hawaii in 1989 and ordered to pay restitution of $28,335.00. In 1994, defendant was convicted in California of two counts of grant theft and sentenced to state prison. She was discharged from parole in October 1999.

At sentencing, count 2 was selected as the principal offense and a high term of three years was imposed. In doing so, the trial court stated that this was defendant's third offense, that she was on probation or parole when she committed it, that her crime involved sophistication, planning and professionalism, and that her convictions were of increasing seriousness. A consecutive sentence of eight months was imposed on count 3.

DISCUSSION

Defendant contends, and the Attorney General aptly concedes, that because no evidence was presented which suggested that the thefts involved in counts 2 and 3 were committed pursuant to separate intents or plans, only a single crime of theft was committed. (See *People v. Packard* (1982) 131 Cal.App.3d 622, 626–627; *People v. Richardson* (1978) 83 Cal.App.3d 853, 866.) Accordingly, we reverse defendant's conviction on count 3 with instructions to dismiss it.

Defendant further contends that imposition of the upper term on count 2 was improper under *Blakely v. Washington* (2004) ___ U.S. ___ [124 S.Ct. 2531]. In *Blakely*, the Supreme Court discussed its holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348] that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id*. at p. 490 [120 S.Ct. at pp. 2362–2363].)

Blakely is of no assistance to defendant. Assuming that *Blakely* applies to California's sentencing scheme and that defendant is entitled to have this court reach the merits of her argument, it is clear under *Apprendi* that a judge may rely on the fact of a prior conviction even when such is not found by the jury. And, as stated in *People v. Thomas* (2001) 91 Cal.App.4th 212, 221–222, "Courts have not described *Apprendi* as requiring jury trials on matters other than the precise 'fact' of a prior conviction. Rather, courts have held that no jury trial right exists on matters involving the more broadly framed issue of 'recidivism.' [Citations.]"

Here, other than the reference to the sophistication involved in defendant's crime, the factors applied in aggravation of sentence necessarily flow from defendant's prior convictions. Under California law, "[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it

known that some of its reasons were improper." (*People v. Price* (1991) 1 Cal.4th 324, 492; see also *People v. Osband* (1996) 13 Cal.4th 622, 728.) On this record, it is not reasonably probable that the trial court would have chosen a lesser sentence had it excluded the sophistication factor from its consideration. Accordingly, defendant's contention must be rejected.

DISPOSITION

The judgment is reversed with respect to count 3, with directions to dismiss that count and to forward a copy of the abstract of judgment reflecting the dismissal to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, Acting P. J.

We concur:

ORTEGA, J.

VOGEL, J.